United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7550, 7607, 7617

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

REX-NORECO, INC.,

Plaintiff-Appellee-Appellant,

v.

ISIDORE GOODSTEIN, PARKSVILLE MOBILE MODULAR HOMES, INC. and ADAM FILIPOWSKI,

Defendants-Appellants-Appellees.

APPEAL IN FORMA PAUPERIS

BRIEF OF DEFENDANT GOODSTEIN-APPELLANT-APPELLEE and JOINT BRIEF OF ALL DEFENDANTS-APPELLANTS-APPELLEES WITH RESPECT TO POINT II

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STATEMENT OF ISSUE PRESENTED FOR REVIEW BY PLAINTIFF'S CROSS-APPEAL

The only issues presented for appeal on plaintiff-appellee-appellant's cross-appeal is whether defendant Goodstein violated certain forfeiture provisions of plaintiff's pension and profit sharing plans and if such violations occurred, the enforceability of section 10.2 of plaintiff's "First Amendment to the Rex-Noreco, Inc. Employees' Pension Plan and Trust" and Section 11.2 of plaintiff's "First Amendment to the Rex-Noreco, Inc. Employees' Profit Plan and Trust" both dated June 28, 1968. Both sections are entitled "Discharge for Cause". Both clauses read as follows:

> "Any member who is discharged from the employment of the Company for cause shall lose and forfeit all of his rights in and to the benefits under the Plan. The words 'discharge for cause' shall be deemed to include those cases where a member has been discharged for proven dishonesty, the commission of a felony, the commission of misdemeanor involving moral turpitude, engaging as a principal of a competitive business, or disclosing trade secrets to a competitor."

The enforceability of such clause turns on the determination of the following two issues:

> (1) Do such clauses represent a good faith effort by plaintiff to estimate the actual damages which would flow from a breach?
>
> (2) Do the maximum actual damages in the sum of $3,816.02 claimed by plaintiff to have been incurred as a result of defendant Goodstein's alleged breach bear a reasonable relationship to the sum of $15,041.00, claimed by plaintiff as a forfeiture under the aforementioned provisions of plaintiff's pension and profit sharing plans?

The Court below found the above provisions unenforceable and answered questions 1 and 2 in the negative.

The issues presented on defendant-appellant-appellee's appeal is limited to the propriety of that portion of the Judgment dated June 10, 1975 awarding plaintiff the sum of $3,816.02 against Goodstein for telephone charges incurred by Goodstein and moving expenses and severance payments voluntarily paid by plaintiff to defendant Goodstein on February 7, 1974.

The propriety of such allowance turns on the resolution of the following issues:

(1) May plaintiff collect such sums from defendant Goodstein in absence of any claim for same in plaintiff's complaint or amended and supplemental complaint?

(2) Does plaintiff's complaint or amended and supplemental complaint make claim for such items or in any way give defendant Goodstein fair notice that such claims are being made?

(3) Assuming affirmative answers to 1 and 2 above, is plaintiff, as a matter of law, entitled to reimbursement on the sums for moving expenses and severance payments in the sum of of $2,466.02 voluntarily paid by plaintiff to defendant?

The Court below did not pass on questions 1 and 2. Question 3 was answered in the affirmative.

The final issues remaining on defendant Goodstein's appeal concern the propriety of the court orders dated November 7, 1974 and June 10, 1975 finding the defendant Goodstein in contempt. The issues presented with respect to these court orders are as follows:

(1) As a matter of law, in view of the court's subsequent holdings as contained in the court's decisions of March 24, 1975, April 14, 1975 and May 14, 1975 and the judgment and order both dated June 10, 1975 did the defendants or any of them violate the order of May 20, 1974 granting a temporary injunction to the plaintiff?

(2) As a matter of law, can the defendants or any of them be held responsible for attorneys' fees and disbursements by reason of their alleged contempt as called for in the orders of November 7, 1974 and June 10, 1975 in view of the court's ultimate holding that the defendants did not compete with the plaintiff, that none of the defendants revealed or disclosed any trade secrets of the plaintiff and that the plaintiff sustained no damage by any of the activities of any of the defendants?

The Court below found the defendant Parksville in civil contempt of court by an order dated November 7, 1974 and of the defendants jointly in contempt in the sum of $1,000 by its order of June 10, 1975, both of which orders represented attorneys fees and disbursements, despite the holding of the Court below that the plaintiff and defendants were not competitive, that none of the defendants revealed any trade secrets of the plaintiff and that the plaintiff did not sustain any damage by reason of defendants' activities.

STATEMENT OF THE CASE

The plaintiff (Rex) is a public corporation engaged (a) in furnishing various services to institutional lenders in connection with loans made by such lenders to mobile home dealers and their retail customers; (b) in furnishing financing to mobile home dealers and their retail customers; and (c) in the operation of mobile home retail sales lots at selected locations. See paragraph 5 of the plaintiff's complaint. The

plaintiff has various subsidiary corporations wholly or partially owned by it which are engaged in divers activities including but not limited to the above activities as well as the insurance business. It is claimed by plaintiff that during the fiscal year ending July 31, 1973 retail sales of mobile homes by mobile sales lots owned or operated by the plaintiff or its subsidiaries accounted for approximately twenty-two percent of the $10,000,000 total revenues of the plaintiff and its subsidiaries on a consolidated basis. See paragraph 6 of the complaint. (App. 4-5)

Defendant Goodstein began his employment with the plaintiff in November ,1965 as a sales lot manager. On or about February 20, 1970 defendant Goodstein was made a vice president of the plaintiff. His salary was approximately $32,000 per year plus other fringe benefits up until August, 1973; subsequently his salary was substantially reduced before his employment terminated on or about February 5, 1974.

During the course of defendant Goodstein's employment with the plaintiff he performed divers functions. Initially he was a sales lot manager. However, during the latter three or four years of his employment and more particularly after he became a Vice President of the plaintiff corporation, his functions were more executive and administrative including supervisory functions, arranging financing with lending institutions for various dealers, and outlets, arranging insurance for such outlets and he also performed general supervisory functions by way of instruction and advice as to the proper management and operation of such outlets.

On August 14, 1970, defendant Goodstein signed a covenant not to compete with plaintiff or any of its subsidiaries. On the same date the parties signed a letter addendum to such agreement. (App. 211-217).

Paragraph 3 of the employment agreement provides as follows:

> "The Employee agrees that on the termination of its (sic) employment, for any reason whatsoever, he will not for (2) two year (s) thereafter engage, either directly or indirectly, in any business or employment similar to or competitive with the business of the Employer, nor will he within said period of time divert or attempt to divert from the Employer, or any business or concern represented by it, any business whatsoever, particularly by influencing or attempting to influence any of the customers or business contacts of the Employer. The Employee agrees to the foregoing covenants and restraints as to his activities upon the termination of his employment, recognizing the irreparable damage which will or may result to the Employer in the event of a breach of these covenants and restraints. The Employee further agrees that in the event of such breach, the Employer shall be entitled, in addition to any other remedies and damages available to it by law, to a preliminary restraint and temporary and permanent injunctions to restrain the violation by the Employee of such covenants and restraints."

The letter-addendum agreement reads as follows:

> "The Agreement that you signed with us on August 14, 1970 does not prevent you, should you leave our employ, from going into the mobile home sales business, providing the sales operation you might go into is located more than a two-hundred (200) mile radius from any of our existing sales locations or ones that we may open in the future."

While defendant Goodstein was employed by Rex, Rex on February 1, 1968 adopted both a pension and profit sharing plan ("plan"). One June 28, 1968, both the pension and profit sharing plans were amended in certain respects not relevant on this appeal. Under the "plan" Rex was required to make certain contributions to Goodstein which became "vested". The

amount of such benefits and the amounts vested depend on the employee's compensation, the required contribution by the employer-Rex and the length of the employee's employment with "Rex". Such vested benefits were subject to divestment or forfeiture if an employee committed certain proscribed acts set forth in either section 10.2 or 11.2 of the profit or pension sharing plans respectively. These paragraphs are identical.

Despite the language of plaintiff's brief to the effect that these conditions of sections 10.2 and 11.2 constitute preconditions or conditions precedent to collection by Goodstein of his vested pension and profit sharing rights, this is clear error. Engaging in any such prohibited activity by an employee constitutes a condition subsequent of an already vested right in the nature of a forfeiture. This is not only the clear intent of the language of the pension and profit sharing plans, but is the only permissible interpretation under the relevant sections of the Internal Revenue Code.

After defendant-Goodstein's employment with "Rex" was terminated on February 5, 1974, plaintiff "paid" Goodstein the sum of $15,041.00 on February 7, 1974 representing pension and profit sharing monies due Goodstein. The payment was in fact represented by giving Goodstein credit for this sum against other monies owed by Goodstein to Rex on prior unrelated transactions so that in fact, "Rex" sent Goodstein a check for approximately $485.00 after making the aforementioned credit.

In November, 1973, Goodstein formed Parksville Mobile Modular Homes, Inc. ("Parksville") although it is conceded that no business of any nature was performed by either Goodstein or "Parksville" until about April 18, 1974 approximately ten weeks after Goodstein's employment with "Rex" terminated.

At or about the time Goodstein formed "Parksville" he engaged in certain minimal preliminary organizational steps such as signing a lease and obtaining business insurance and the like. Although these acts and phone calls took place while Goodstein was still in "Rex's" employ there is no claim made or proof offered that such work took place on "Rex's" time or that such activities prevented Goodstein from performing his duties with Rex in other than a highly competent manner. The trial court in its decision dated May 14, 1975, on page 3, (App. 490) found as follows:

> "Parksville did not engage in business until well after Goodstein's resignation and there is no evidence that his work for Rex was in any way unsatisfactory before that time."

After defendant commenced doing business in April 1974, in the corporate form of "Parksville", Rex commenced an action against Goodstein and Parksville. The only difference between plaintiff's complaint filed April 18, 1974 and its amended and supplemental complaint filed January 8, 1975, is that the latter complaint contains a claim against the defendant Filipowski based on his purchase of Goodstein stock in "Parksville" on or about July 30, 1974 and his association with "Parksville" thereafter.

Plaintiff's complaint contains five claims for relief which request the following relief:

(a) First claim - injunctive relief based on the restrictive covenant.

(b) Second claim - an accounting for profits based on the same restrictive covenant.

(c) Third claim - $250,000 with no recital as to its basis other than a reference to paragraphs "1" through "17" of the complaint constituting the First claim.

(d) Fourth claim - the sum of $15,041.00 based on the forfeiture provisions of Rex's pension and profit sharing plans.

(e) First claim - a claim for damages in an unnamed amount against Goodstein and Filipowski "for the tortious acts of the deficiently formed corporation" (Parksville).

The "Wherefore" clause of the complaint requested $275,000 and $262,500 against Goodstein and Filipowski respectively re the Fifth claim.

On May 20, 1974, plaintiff obtained an order temporarily enjoining Goodstein and Parksville from competing with plaintiff in the mobile home business.

The key affidavit submitted in support of said application for a temporary injunction was by Mark A. Salitan, the president of "Rex". The affidavit of Salitan, sworn to April 25, 1974 (App. 19-21) stated that plaintiff sold both new and used mobile homes. On page 1, paragraph 3, Mr. Salitan stated the following:

"3. As an adjunct and important support company to the main business affairs of Rex, a retail sales subsidiary called Loch Sheldrake Mobile was incorporated by us on January 28, 1969, to sell at the retail level new and used mobile homes at a certain location in Fallsburg, New York (sometimes called Loch Sheldrake, New York). This location has always and does now handle, among other mobile homes, any repossessions or inventory of a dealership who may be in default between all the various lending banks with whom Rex has service agreements."

Attached to Mr. Salitan's affidavit were various exhibits of advertisements of plaintiff most of which to the effect that "Rex" sold both used and mobile homes of all types and sizes (App. 23-45, 47).

These statements were found at trial to be absolutely false. Plaintiff had no new mobile homes on its location. The average age was about five (5) years old. Plaintiff's inventory records for the period June 1, 1974 - October 31, 1974, the period immediately following the injunction order of May 20, 1974 showed that plaintiff only had three mobile homes that were about three years old (App. 452, P's exhibit 55, App. 252, 314). At no time did plaintiff sell new mobile homes. During the same period defendant, Parksville's mobile homes were all factory new (App. 452).

The Court further found that despite plaintiff's prior suggestions that it sold all types of mobile homes that in fact it sold only "10 and 12 footers" while Parksville's sales with one exception were either 14 or 24 (double wide) footers" (App. 451).

The Court at trial later found that plaintiff and defendants were not competitive by reason of price (in part because of age), financing arrangement differences by reason of the age of the homes, and the size of the homes (App. 450-452, 252-314, P's. Ex. 55, Goodstein Ex. L, App. 347).

At trial the court vacated its order of temporary injunction. The temporary injunction contained in the court order of May 20, 1974 was primarily based upon the misrepresentations of plaintiff as aforesaid in its original motion papers.

By orders dated November 7, 1974 and June 10, 1975, defendants Goodstein, Parksville and Filipowski (order of June 10, 1975 only) were found guilty of contempt for violating the court order of May 20, 1974 and fined the sum of $2,070.30 for attorneys' fees and disbursements and $1,000.00 per June 10, 1975 order.

By memorandum decision-order dated December 31, 1974 the court fined defendant Parksville the additional sum of $2,455.00 for damages sustained by Rex by various sales made by defendant during the month of August, 1974 (App. 207-21). The memorandum decision-order in fact supplemented the order of contempt of November 7, 1974 where the court fined the defendant Parksville the sum of $2,070.30 representing attorneys' fees and disbursements but which order of November 7 did not determine at that time damages allegedly sustained by plaintiff with regard to certain sales made by defendant Parksville allegedly in violation of the order of temporary injunction dated May 20, 1974.

The fact that the Court clearly relied upon the misrepresentations of plaintiff as referred to hereinabove and more particularly in the affidavit of Mark A. Salitan, plaintiff's president, sworn to April 25, 1974 and the exhibits annexed thereto is demonstrated by the unequivocable language of Judge Lasker at the end of his opinion where he stated that plaintiff sold both <u>new</u> and used mobile homes (App. 210).

"Defendant also contends that damages should not be assessed because Rex-Noreco's Loch Sheldrake operation "emphasized" the sale of used mobile homes, while Parksville sold only new ones. This claim is wholly without merit. Rex-Noreco sold new as well as used units and therefore suffered a loss from Parksville's business."

The Court, based on this misapprehension, awarded damages to plaintiff in the sum of $2,455.00 for certain sales made by defendants allegedly in violation of the court order of May 20, 1974. At the trial, after it was conclusively demonstrated that plaintiff and defendants were totally non-competitive and the misrepresentations contained in the affidavit of Mark A. Salitan of April 25, 1974 were documented, the court on its own motion vacated its award of $2,455.00 as set forth hereinabove and vacated all portions of its contempt order of November 7, 1974 except that portion of said order awarding attorneys' fees and disbursements to plaintiff in the sum of $2,070.30 (the court opinion of April 14, 1975, App. 444-454 (453)).

The trial in this matter commenced on January 20, 1975. The court rendered three separate decisions in this matter dated March 24, 1975, April 14 and May 14, 1975. In plaintiff's brief in its statement of facts, it refers to certain "findings" of the court below to sustain its position with respect to its cross-appeal with regard to its claim for pension monies. Plaintiff failed to call to the court's attention subsequent findings of fact which the court made in its decision dated April 14, 1975 which clearly make irrelevant the prior findings found in the court's opinion of March 24, 1975, which were set forth by plaintiff in its brief. The court specifically found in its decision of April 14, 1975 that plaintiff and defendants were not competitive.

"Rex has the burden of establishing by competent proof that it has been damaged by the sales in question. Babee-Tenda Corp. v. Scharco Mfg. Co., supra, 156 F.Supp. at 588. By letter dated March 26, 1975, plaintiff's counsel stated that plaintiff has no further evidence to offer as to damages and that it rests on the record as developed in the proceedings to date. For the reasons stated below, we find that Rex is not entitled to compensatory damages for the seventeen sales in issue on the present motion.

"Not surprisingly, Rex relies heavily on our December 31, 1974 memorandum relating to the original motion to hold defendants in contempt. We stated there that plaintiff was entitled to recover the profits it lost as a result of the three sales in question, which were presumed to be the same as Parksville's actual profits. However, at the time of the original motion for contempt, which preceded the trial on the merits, the record did not indicate the number of mobile home dealers in the Loch Sheldrake-Parksville area, the scope of the geographic area from which plaintiff and defendants draw potential customers, and the degree to which units offered by defendants compete with those offered by Rex. On such a thin record, it was fair to infer that any sales made by Parksville, as the 'only other dealer in town,' diverted sales and profits from Rex's location seven miles away.

"However, the record as developed at trial no longer supports such an inference. It was established at trial that there are approximately ten retail mobile home dealers within a ten-mile radius of plaintiff's Loch Sheldrake location and close to fifty dealers within a radius of twenty-five miles. No doubt there are many more than fifty dealers within the effective market area of the Loch Sheldrake and Parksville locations, which was established to be approximately a seventy-five mile radius from Parksville, New York.

"There is no evidence of record to suggest that Rex would have made any, much less all, of the seventeen sales made by Parksville in violation of the preliminary injunction. It was established at trial, and we have found, that plaintiff's products (which are exclusively refurbished units) compete with those offered by Parksville to the extent that Parksville offers similar units taken as trade-ins, or factory new units similarly priced to "like-new" refurbished units offered by plaintiff -- those less than three years old. (See Memorandum dated March 24, 1975, Findings of Fact Nos. 32, 33). No inference can be drawn that Parksville diverted sales from Rex unless Parksville

sold units competitive with those offered by Rex during the relevant period from June 1, 1974 to October 31, 1974. The record clearly does not support the inference. All seventeen of Parksville's sales were factory new units; sixteen of these were fourteen foot wide units, and one was twelve feet wide. Rex's refurbished homes are all ten or twelve feet wide. Moreover, the inventory records for Rex's Loch Sheldrake location for the period June 1, 1974 to October 31, 1974 show that during that period Rex had for sale only three units less than three years old which remained unsold at the end of October. (See Plaintiff's Exhibit 55.) At most, therefore, Parksville could have diverted only these three sales from Rex, rather than the seventeen claimed.

"These facts, coupled with the existence of a large number of competitors of Rex, require a finding that Parksville's sales were not at Rex's expense and accordingly Rex is not entitled to compensatory damages.[2/]

IV.

"As noted above, we awarded damages to plaintiff on the original motion to hold Parksville in contempt, which Parksville states it is unable to pay. Such an award was proper on the basis of the record as it then stood. However, we would not have awarded damages at that time if counsel had brought to our attention, as was their obligation, all of the facts which are now in the record, and which require a finding that plaintiff was not and is not entitled to compensatory damages. Accordingly, Parksville is relieved from our earlier Order to pay compensatory damages...." (App. 450-453)

Furthermore the Court found that defendant Goodstein had not disclosed any trade secrets of plaintiff to anyone. The Court, in its opinion dated March 24, 1975 on page 10, paragraph 8 (App. 416) states, as follows:

"8. Goodstein, as a former vice-president of Rex, possesses substantial knowledge about its particular operating practices and finance arrangements with customer banks, and was a highly valuable employee of Rex. However, the information which Goodstein possesses is not materially different from that possessed by others experienced in the retail mobile home business. Accordingly, Rex is not entitled to a further injunction against Goodstein's use of such information."

The Court below therefore found that none of the defendants had divulged any trade secrets of plaintiff to anyone nor had they competed with plaintiff. No claim has been made that the defendant Goodstein was discharged for proven dishonesty. These three grounds, i.e., competition, disclosures of trade secrets and discharge for proven dishonesty are the only basis for the forfeiture under section 11.2. The Court's findings unequivocably state that none of these grounds have been met.

Plaintiff's counsel, Jeffrey A. Fillman, Esq., in a prior affidavit to this Court of October 22, 1975, stated that there was no need for a transcript in this matter and that plaintiff was accepting all the findings of fact of the Court below. On pages 2 and 3 of Mr. Fillman's affidavit of October 22, 1975, he made the following statements:

> "My position has consistently been that I will stipulate to all of the facts as found by the court below."

Furthermore, on pages 3 and 4 plaintiff's counsel states:

> "Counsel for Goodstein suggests that plaintiff should be required to furnish a transcript in view of the pendency of a cross-appeal. However, no transcript is required in connection with the cross-appeal because the cross-appeal does not challenge a single Finding of Fact by the court below. The only question raised by the cross-appeal is whether an undisputed provision in plaintiff's Pension and Profit Sharing Plan is, as a matter of law, an unenforceable liquidated damage provision. . . ."

Defendant Goodstein seeks affirmance of that portion of the judgment of the Court below disallowing plaintiff's claim for $15,041 representing pension and profit sharing monies paid to Goodstein. Defendant Goodstein appeals from that portion of the court order dated November 7, 1974 not vacated, namely the awarding of counsel fees and disbursements,

in the sum of $2,070.30 by reason of defendants' alleged contempt. Defendant Goodstein further appeals from the order of contempt dated June 10, 1975 holding him jointly and severally responsible with the other defendants for counsel fees and disbursements in the sum of $1,000 by reason of a further alleged contempt. Defendants Parksville and Filipowski join in defendant Goodstein's brief with respect to this issue of counsel fees and disbursements of $1,000 and shall not file a separate brief as this is the only order or award adversely affecting them. Finally, Goodstein appeals from the judgment of June 10, 1975 with respect to the award of $3,816.02 representing charges for unauthorized phone calls by Goodstein in organizing Parksville ($350), severance payment ($1,466.02) and moving expenses ($2,000.00). After judgment, the Court below by order dated September 3, 1975 granted leave to defendant Goodstein to appeal in forma pauperis.

ARGUMENT

POINT I

THE "FORFEITURE" PROVISIONS OF THE PENSION AND PROFIT SHARING PLANS ARE UNENFORCEABLE FORFEITURES OF DEFENDANT GOODSTEIN'S VESTED RIGHTS. IN ANY EVENT EVEN IF ENFORCEABLE SUCH PROVISIONS WERE NEVER VIOLATED BY DEFENDANT GOODSTEIN.

The first question to be determined with regard to plaintiff's cross-appeal involving $15,041 for return of pension monies paid to Goodstein, is whether Goodstein violated the applicable provisions of

of plaintiff's pension and profit sharing plans. Even if such forfeiture provisions are enforceable, if there is no violation plaintiff is not entitled to repayment of any such monies. Section 11.2 reads, as follows:

> "Any member who is discharged from the employment of the Company for cause shall lose and forfeit all of his rights in and to the benefits under the Plan. The words 'discharge for cause' shall be deemed to include those cases where a member has been discharged for proven dishonesty, the commission of a felony, the commission of misdemeanor involving moral turpitude, engaging as a principal of a competitive business, or disclosing trade secrets to a competitor."

In order for plaintiff to take advantage of said forfeiture provision, the first requirement that plaintiff must show is that defendant Goodstein was discharged for cause. Admittedly defendant Goodstein was not discharged from his employment with plaintiff for cause or otherwise. It is conceded that defendant Goodstein terminated his employment on or about February 5, 1974. Whether Goodstein's contention that he was provoked into terminating his employment or not is correct, is irrelevant for purposes of this discussion. Plaintiff concedes this point, but suggests that if it had known certain activities of defendant Goodstein it would have discharged him and therefore this is tantamont to compliance with its own forfeiture provision. The only problem with this argument is this is not what the forfeiture provision says. Plaintiff, as the draftsman of its own pension plan, could easily have inserted a clause to the effect that if an employee is discharged or commits an act which is the basis for discharge, but it is discovered after employment is terminated, such employee forfeits his pension rights. Such clauses are not uncommon in pension plans and in other comparable agreements. The fact that plaintiff either deliberately or through

inadvertance did not include such a clause should not inure to their benefit. It is fundamental that any ambiguity in an agreement is to be construed against the party drafting it, in this case, the plaintiff. It is a further fundamental principle, needing no citation of authority, that forfeiture provisions are strictly construed, that the law abhors forfeitures and that if there are two reasonable interpretations of ambiguous agreements, one of which results in a forfeiture and one of which does not, the court will not sanction a forfeiture under such circumstances.

Furthermore, even if the court accepts the argument by plaintiff that discharge followed by discovery of certain improper acts is tantamount to compliance to discovery and subsequent discharge for the same acts, it is respectfully submitted that the acts which are the basis for the discharge, whether discovered before or after, must be of a serious enough nature to warrant forfeiture of vested pension rights. The so-called improper acts of Goodstein were of the most inconsequential nature. They stated that during the last few months of his almost 10 year employment with plaintiff and plaintiff's predecessor, that he incorporated the corporation defendant "Parksville", arranged for a lease and made other preliminary arrangements for its ultimate operation, such as obtaining a lease, insurance, making incidental phone calls and the like. It was conceded that defendants Goodstein and "Parksville" did not conduct any business in any manner until mid-April, 1974, some ten weeks after Goodstein's employment with plaintiff terminated. Furthermore, when such business did commence, it was ultimately found to be totally non-competitive.

There was no claim that while Goodstein was in plaintiff's employ that his work was in any way unsatisfactory or that he failed to dedicate his full energies to the plaintiff. There was no proof offered that the so-called phone calls to insurance brokers and attorneys were even done on plaintiff's time. Even if the Court wishes to assume that these activities were done on plaintiff's time they could not conceivably have represented more than a few hours of defendant's efforts. It cannot be seriously argued that even if these do constitute improper acts that they are the reasonable basis for a forfeiture of over $15,000.

In passing, it should be noted that the Court below found that the forfeiture provision was unenforceable as a matter of law because it makes no attempt to distinguish discharges for comparatively trivial matters such as abuse of mailing and phone privileges and more serious charges, such as embezzlement. (See Court opinion dated May 14, 1975, App. 489) In plaintiff's pension and profit sharing plans, as in all pension and profit sharing plans, the longer an employee works, the greater his rights accrue and the more benefits he will ultimately receive. Nevertheless, it should be noted that plaintiff's plan makes no attempt to differentiate or to define those acts which would be the basis of a discharge and therefore a forfeiture of a comparatively new employee who had modest accrued benefits and one such as the defendant who was an employee for several years and who at the applicable time had rather substantially accrued benefits in excess of $15,000.

Assuming for the purposes of argument the enforceability of such clause, the next requirement that must be met is that the employee in order to violate such forfeiture provision had to be discharged for

"proven dishonesty, the commission of a felony, the commission of misdemeanor involving moral turpitude". There is not even a claim made that defendant committed a felony or a misdemeanor of any kind. Presumably the phrase "proven dishonesty" is to be read in conjunction with the phrase, the commission of a felony, the commission of a misdemeanor involving moral turpitude so that the so-called "proven dishonesty" should be of the same magnitude of a felony or the commission of a misdemeanor involving moral turpitude. There is no suggestion that defendant Goodstein did anything remotely resembling same.

Another possible basis for plaintiff taking advantage of the forfeiture provisions, again assuming for argument sake their enforceability, is to prove Goodstein engaged as a principal of a competive business or disclosed trade secrets to a competitor. The Court found in the clearest language that none of the defendants including Goodstein competed with plaintiff or disclosed any trade secrets to any competitor of plaintiff.

It must be remembered that the primary relief sought by the plaintiff was for an injunction based upon defendants' violation of the covenant not to compete referred to hereinabove. The so-called violation of this covenant not to compete was by reason of defendants' competition with plaintiff. The Court, after trial, found that the defendants did not compete with the plaintiff and in fact vacated its prior order of May 20, 1974 granting the temporary injunction. Plaintiff has chosen not to appeal from this portion of the judgment permanently vacating the temporary

injunction which was based substantially in part by reason of the lack of competition between plaintiff and defendants. In fact, plaintiff has conceded, by its failure to appeal, the correctness of the Court's decision below that plaintiff and defendants did not compete and the ultimate vacatur of the injunction. If the parties do not compete for the purposes of granting an injunction, then by definition, they do not compete for purposes of the forfeiture provision relied upon in plaintiff's pension and profit sharing plans. To suggest that somehow plaintiff and defendants do not compete for one purpose, i.e., injunction, but do compete for another purpose, i.e., a forfeiture of vested pension rights, is not only inconsistent but borders on the preposterous.

If plaintiff contends that defendant Goodstein's pension rights in excess of $15,000 should be forfeited by reason of his improper competition with plaintiff then the burden is on the plaintiff to show in the record that such competition exists. The most logical place this may be found is in the transcript of the trial. Plaintiff has chosen not to order a transcript and has in fact certified that on this appeal a transcript is not necessary. Plaintiff has further stated, through its counsel, Jeffrey A. Fillman, in an affidavit to this Court, sworn to October 22, 1975, with respect to an application to vacate the dismissal of plaintiff's cross-appeal, that for the purposes of this appeal, plaintiff "will stipulate as to all of the facts as found by the court below" (p. 2 of Fillman Affidavit, October 2, 1975). Plaintiff's counsel further stated on pages 3 and 4 of the same affidavit, that no transcript is required in connection with the

cross-appeal because "the cross-appeal does not challenge a single Finding of Fact by the Court below. . ." (p. 3-4

The findings below unequivocably state that the plaintiff and defendants were not competitive. Plaintiff mistakenly relies on a statement in Judge Lasker's decision dated March 24, 1975 to the effect that plaintiff and defendants compete even though plaintiff sold only used refurbished mobile homes while defendants sold only factory new mobile homes. See Finding 32, App. 414.) However, this finding does not mean what plaintiff suggests. It only means that in the abstract it is possible that some used mobile homes of a recent vintage which had been refurbished may compete with the same type of factory new mobile homes if their prices are similar enough. However, in the subsequent opinions of the Court, the Court specifically found that there was no such competition. In the Court's opinion of April 14, 1975, pages 7 and 8 thereof (App. 451-452) the Court clarified these findings of fact relied upon by plaintiff and unequivocably stated that upon a further review of the full trial record, it was clear that plaintiff and defendants did not compete:

> "There is no evidence of record to suggest that Rex would have made any, much less all, of the seventeen sales made by Parksville in violation of the preliminary injunction. It was established at trial, and we have found, that plaintiff's products (which are exclusively refurbished units) compete with those offered by Parksville to the extent that Parksville offers similar units taken as trade-ins, or factory new units similarly priced to "like-new" refurbished units offered by plaintiff--those less than three years old. (See Memorandum dated March 24, 1975, Findings of Fact Nos. 32, 33). No inference can be drawn that Parksville diverted sales from Rex unless Parksville sold units competitive with those offered by Rex during the relevant period from June 1, 1974 to October 31, 1974. The record clearly does not support the inference. All seventeen of Parksville's sales were factory new units; sixteen of these

were fourteen foot wide units, and one was twelve feet wide. Rex's refurbished homes are all ten or twelve feet wide. Moreover, the inventory records for Rex's Loch Sheldrake location for the period June 1, 1974 to October 31, 1974 show that during that period Rex had for sale only three units less than three years old which remained unsold at the end of October. (See Plaintiff's Exhibit 55.) At most, therefore, Parksville could have diverted only these three sales from Rex, rather than the seventeen claimed.

"These facts, coupled with the existence of a large number of competitors of Rex, require a finding that Parksville's sales were not at Rex's expense and accordingly Rex is not entitled to compensatory damages.2/" (Emphasis supplied)

The record below demonstrates that plaintiff and defendants are totally non-competitive. In the first place plaintiff sells only used refurbished mobile homes while defendants sold only factory new mobile homes. (P. Ex. 55, App. 252-314; Exhibits to Affidavit of Doris Oelbaum, sworn to April 25, 1974, App. 66-103). It is further conceded that the average age of the mobile home sold by plaintiff was approximately 5 years old. The record clearly demonstrates that the exact same mobile home, model, size, etc. substantially depreciates in 5 years from a factory new mobile home.

As an illustration of the amount of depreciation in new mobile homes as opposed to refurbished used mobile homes, the Court's attention is directed to defendant Goodstein's Exhibit L in evidence, the Directory of Used Mobile Homes. There it will be seen that a 1970 Champion 60 x 12 wholesaled in 1970 to a dealer for $7,265. In 1974 the market value was $4,432, a depreciation of $2,800 or almost forty percent in four years. Goodstein's Exhibit L, page 143.

A 1969 Champion 60 x 12 wholesaled for $7,065 in 1969. The market value of this same mobile home in 1974 is $3,956, a depreciation of approximately $3,000, or forty-two percent in five years (page 145, Exhibit L).

A 1969 Skyline wholesaled for $6,055 in 1969. In 1974, the same home had a market value of $3,205, a depreciation of approximately fifty percent in five years (App. 347-349, Exhibit L).

Plaintiff's Exhibit 54A through G discloses the following information: (a) that for the period March 30, 1973 to date, Loch Rex's wholly owned subsidiary Sheldrake Mobile Home Sales, Inc./sold no new mobile homes as they defined the term new; (b) prior to March 30, 1973, Loch Sheldrake Mobile Homes Sales, Inc. sold new mobile homes; (c) that during the year 1973 before defendants ever began to operate, Loch Sheldrake Mobile Home Sales, Inc. lost money; (d) for the period July 31, 1972 to July 31, 1973, during which time Loch Sheldrake sold both new and used mobile homes and which covers a period primarily before the March 30, 1973 sale, Loch Sheldrake's income before Federal income taxes was a $11,564 loss (Plaintiff's Exhibit 54F); (e) for the three month period ending October 31, 1974, Loch Sheldrake Mobile Home, now a division of the plaintiff, lost $9,100 before taxes. This was for the period of time of August, September and October of 1974 during which defendants made virtually no sales of mobile homes. (App. 228-251)

It was further vestified at the trial below that plaintiff and defendants were non-competitive in yet another regard. In the sale of new mobile homes which defendants engaged in solely, there is a standard down payment of 15% of the purchase price. A typical new mobile home retailing for approximately $9,000 or $10,000 will require a standard down payment of $1,500. On a used mobile home, which plaintiff deals in exclusively, it was testified to without contradiction that there is either no down payment at all or a minimal one of $200 or $300. This alone conclusively

establishes that the two types of mobile homes are non-competitive in that they deal with two separate and distinct markets.

Plaintiff and defendants were further found by the Court to be non-competitive with regard to the size of the mobile homes sold by them respectively. On page 8 of the Court's opinion dated April 14, 1975 (App. 452), the Court not only found that all 17 of defendant's Parksville's sales were factory new units, but that 16 were 14 foot wide units and one was 12 foot wide; whereas Rex's refurbished homes were either 10 or 12 feet wide. Additionally, of course, the Court found that during the period June 1, 1974 to October 31, 1974 the period immediately following the issuance of the temporary injunction of May 20, 1974, that Rex had for sale out of all of its units, only three units which were as new as three years.

The record and the Court findings are unequivocably clear in that plaintiff and defendants are not competitive. The fact that plaintiff has chosen not to appeal from the vacatur of its preliminary injunction, which was in fact based on a non-compete clause, is perhaps the best proof that the Court's findings below regarding the lack of competition between plaintiff and defendants, is correct. In any event, plaintiff's counsel has stated that for purposes of his cross-appeal he does not contest one single finding of fact of the Court below.

The final basis the plaintiff may assert in order to take effect of its forfeiture clause is that defendants disclosed trade secrets to competitors of plaintiff. There is not one statement in the record to this effect or to sustain this conclusion. In fact at the trial, defendants strenuously urged that by reason of the limited definition of a trade

secret defendant Goodstein never acquired any trade secrets from plaintiff to disclose. Defendants successfully argued below that at most what defendant Goodstein acquired from plaintiff was general knowledge of the mobile home business which everyone in the industry had and which by no stretch of the imagination meets the test of a trade secret. The Court in its opinion dated March 24, 1975, concurred in this contention of the defendants. The Court in its opinion dated March 24, 1975 found that Goodstein neither passed nor divulged any trade secrets to anyone. On page 10, paragraph 8, the Court stated, as follows:

> "8. Goodstein, as a former vice-president of Rex, possesses substantial knowledge about its particular operating practices and finance arrangements with customer banks, and was a highly valuable employee of Rex. However, the information which Goodstein possesses is not materially different from that possessed by others experienced in the retail mobile home business. Accordingly, Rex is not entitled to a further injunction against Goodstein's use of such information." (App. 416)

Clearly, even assuming for purposes of argument, the enforceability of plaintiff's forfeiture provision, it is clear that defendants did not violate any of the terms of such agreement as was found by the Court below.

The only argument made by plaintiff to the effect that defendant Goodstein violated this agreement was to the effect that he violated his fiduciary duties to plaintiff by organizing the corporate defendant Parksville while still in the employ of plaintiff; getting insurance, signing leases and the like. There are several things wrong with this argument. In the first instance, plaintiff's forfeiture provision does not set forth "violation of a fiduciary duty" as a ground for forfeiture. In the second instance even if violation of a fiduciary duty should be construed as being within the purview of plaintiff's forfeiture provision,

it is clear that Goodstein did not violate any fiduciary obligation. Plaintiff suggests that defendant violated his fiduciary duty by setting up Parksville. However, it has been found by the Court below that the setting up of Parksville while Goodstein was still in plaintiff's employ consisted solely of arranging with an attorney to file a certificate of incorporation, executing a lease, obtaining insurance and the like preliminary functions. A fair inference is that this took no more than a few hours of defendant Goodstein's time over a period of several months. There is nothing in the record to indicate that those few hours of work were even performed on plaintiff's time. There is no claim even made by plaintiff that defendant Goodstein's work was less than highly satisfactory at any time during his employment, including the time when he made these phone calls, etc. The Court, in its opinion of May 14, 1975, p. 3 (App. 490) found that Goodstein did not violate his fiduciary duties in any way because (1) "Parksville" did not engage in business until April, 1974, well after Goodstein's resignation in February, 1974 and (2) that there was no evidence that Goodstein's work for Rex was in any way unsatisfactory before that time.

For purposes of entry of judgment, it was stipulated between counsel that the unauthorized phone calls made by Goodstein in setting up his business amounted to the sum of $350. To suggest that a penalty of over $15,000 may be assessed for this misuse of a phone credit card is absurd. The Court, in the same opinion, page 3 (App. 490) held that such an assessment would constitute a penalty as a matter of law and renders the forfeiture clause unenforceable.

This latter finding of the Court leads into the final question regarding plaintiff's forfeiture provision, namely, assuming a violation of same by defendants, is such clause enforceable. The Court below held that it was unenforceable.

The forfeiture clause, whether it be entitled the "penalty clause", a "liquidated damage clause" or by any other name must comply with the rule of reasonableness. It is a universal proposition that a sum named as liquidated damages in order to be given effect must be reasonable in amount. Williston on Contracts, Third Edition, Volume 5, Sec. 779, page 695; Restatement, Contracts, Sec. 339(1)(a); Priebe & Sons, Inc. v. United States, 332 U.S. 407. Williston states that decisions from virtually every jurisdiction support this principle. Williston cites the United States Supreme Court in Kothe v. Taylor Trust, 280 U.S. 224, which quotes United States v. United Engineering Co., 234 U.S. 236, as follows:

> "But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced."

See Williston, supra, page 697.

On page 699 Williston quotes with approval the following language:

> "While the intention of the parties must be taken into consideration, the language of the contract is not conclusive. The courts of this state, as well as in other jurisdictions, lean toward a construction which excludes the idea of liquidated damages and permits the parties to recover only the damages actually sustained."

To the same effect see Sec. 2-718 of the Uniform Commercial Code.

In Caesar v. Rubinson, 174 N.Y. 492, 67 N.E. 58, the sum of $1,000 was deposited to secure the faithful performance of a lease. The only breach complained of was the failure to pay $45 of monthly rent. The lease expressly stated that the $1,000 deposit was to be treated as liquidated damages. Nevertheless the court refused to uphold such provision, treating it as penal and confined the landlord to his actual damage, namely, the sum of $45.

Here the plaintiff is attempting to obtain over $15,000 based on no showing of damages whatever other than possible phone calls of a few hundred dollars made by the defendant Goodstein. Plaintiff's showing of damages has been absolutely nil.

As the Court below stated, plaintiff's forfeiture clause must be held to be unenforceable because it makes no attempt to have the penalty bear any reasonable relationship to the offense. Admittedly the most damages plaintiff sustained by reason of any conduct of Goodstein is in the sum of $3,816.02, of which $350 represents unauthorized phone calls, $2,000 represents moving expenses and $1,466.02 represents severance payments. The latter two payments were made by plaintiff to defendant Goodstein voluntarily and are not in any way relevant to any damages sustained by plaintiff which could form the basis of a forfeiture under section 11.2 of its pension and profit sharing plan. On its face, plaintiff may not be entitled to a recovery of over $15,000, when by its own version of the facts, its maximum damages did not exceed $3,816.02 and where in fact most of its damages could have been for unauthorized phone calls of $350.

Furthermore, the clause is unenforceable by reason of the fact that it makes no attempt to differentiate between comparatively minor infractions such as Goodstein's misuse of a telephone service and more serious ones, such as embezzlement (not claimed here) or disclosure of bonafide trade secrets to a competitor (claimed, but rejected by the Court). Plaintiff's penalty clause is unenforceable further by reason of the fact that it makes no attempt to differentiate berween those violations which would cause forfeiture in a new employee and an old one. At the time of Goodstein's termination of employment he had been employed by plaintiff and plaintiff's predecessor for almost 10 years. It hardly needs lengthy discussion that the type of act which may be the basis of a discharge for cause of a low level recently employed employee may be of a far less serious nature than the discharge for cause of a high level long employed employee, such as Goodstein. Plaintiff's forfeiture provision makes no attempt to differentiate between the two cases and in fact treats them the same. What makes this particularly obnoxious and unenforceable is that the long term high level employee may not only be discharged for a comparatively trivial violation under plaintiff's plan as a low level new employee, but the high level employee, such as Goodstein, may sustain more serious damages by reason of his accrued and accumulated benefits under the plan. Even assuming that Goodstein did not advise plaintiff that he was organizing "Parksville", a non-competitive corporation and that he should have, there is no proof anywhere in the record that as a result of his failure to disclose that Rex has sustained or is likely to sustain damages anywhere approximating the

amount of Goodstein's accrued pension benefits in excess of $15,000.

One final point must be made with respect to plaintiff's cross-appeal regarding its forfeiture provisions. Plaintiff has attempted to suggest that the conditions contained in section 11.2 are conditions precedent to an employee obtaining pension rights. This is total error. These conditions are clearly conditions subsequent. According to plaintiff, if an employee was in plaintiff's emply for 40 or 50 years and the moment his employment was about to terminate by reason of retirement, he committed an act which was a misdemeanor, he would not be entitled to one cent of pension rights because his freedom from committing a misdemeanor is a condition precedent to getting his pension rights. This is manifestly absurd and more importantly in violation of the Internal Revenue Code. Clearly, what section 11.2 of the pension and profit sharing plan meant is that an employee has vested rights in his pension and that if he commits a serious enough act this vested rights will act as a divestment of these vested rights. It is up to the employer to show that these acts are committed so as to divest an employer of his rights; it is not up to the employee to show that he didn't commit one of these acts as a condition precedent to his right to get such pension benefits. Plaintiff apparently argues in favor of a condition precedent because if defendant Goodstein has a vested right subject to divestment rather than as plaintiff claims, plaintiff knows that its against public policy of every jurisdiction to permit a forfeiture of a vested right, except in the most extreme circumstances, especially a claim for wages. Pension rights being a fringe benefit are considered wages and it is a crime in New York for an employer not to pay wages. See New York Labor Law, Section 198, subdivisions (a) and (b), et seq.

Furthermore, under the applicable provisions of the Internal Revenue Code, there is the requirement that pension rights vest. See 26 U.S.C. § 411. Under the new law effective September 2, 1974, the pension plan must provide that the employee's benefits vest in any one of three alternatives, as follows:

(a) The simplest of these is a provision that makes every employee fully vested after ten years of service, although he will not receive the money until some time thereafter.

(b) The second alternative permits the employer to give the employee 25% of his earned pension right after five years in the plan and then increase this 5% more for each year of service up to ten years and then 10% more for each additional year of service up to 15 years. A worker quitting after 14 years in the plan would be entitled to 90% of the pension earned to that point.

(c) The final alternative is known as the "Rule of 45" and combines years of age with years of service to determine how much pension has been earned. An employee that has at least five years of service and who is 45 years of age would be 50% vested. This increases 10% a year until his age and years of service, total 55, at which time he is 100% vested.

All three alternatives have one thing in common -- after 15 years of service every employee is 100% vested. All three plans have one additional factor in common -- every employee becomes partially vested after so many years of employment. Under the old law, effective up to September 1, 1974, there was no specific plan of vesting as indicated above. However, it was provided in the appropriate regulations that every plan, in order to

be approved, had to have a "reasonable" vesting procedure. And it was further required that every employee become partially vested at some point depending on the number of years of service. Both the old law and the new law are given because this plan was enacted while the old law was in effect, i.e., 19[illegible] but the attempted enforcement of the forfeiture provision is taking place after the enactment of the new law. It is respectfully submitted that the forfeiture provision should be interpreted in accordance with the new law, since the attempted enforcement of same is taking place after the enactment of the new law of September 2, 1974. In any event it makes little difference because both under the new law and the old law, pension rights of an employee have to become vested after so many years of service and under both the new law and old law there is a requirement of partial vesting as the employee gets more and more service. In fact, plaintiff's pension plan provides for partial vesting and would not have been approved by the Internal Revenue Service if it did not.

The plaintiff attempts in its brief to site various authorities to sustain its position that its forfeiture clause is enforceable. What the plaintiff does not state is that in the case of Bradford v. New York Times Company, 501 F.2d 51 (2d Cir. 1974) the court specifically rejected and overruled holdings of the cases cited by plaintiff in this memorandum. On pages 55-56 the court stated the following:

> "Since the Plan and the agreement executed pursuant to its terms did limit Bradford's employment opportunities after he severed his relationship with the Times, we are dealing with a restraint which is valid only if it is found to be reasonable. The New York Court of Appeals has announced that there are

> powerful considerations of public policy which militate against the sanctioning of the loss of a man's livelihood. The covenant not to compete with a former employer is subject to an 'overriding limitation of reasonableness.' Karpinski v. Ingrasci, 28 N.Y.2d 45, 49, 320 N.Y.S.2d 1, 4, 268 N.E.2d 751, 753 (1971); Purchasing Associates, Inc. v. Weitz, 13 N.Y.2d 267, 272, 246 N.Y.S.2d 600, 603-604, 196 N.E.2d 245, 247-248 (1963). In view of the strong public policy of the state, we cannot accept the theory that New York has adopted the so-called 'employee choice' doctrine, which is alleged to make judicial determination of reasonableness unnecessary. Kristt v. Whelan, 4 A.D.2d 195, 164 N.Y.S.2d 239 (1st Dep't 1957), aff'd without opinion 5 N.Y.2d 807, 181 N.Y.S. 2d 205, 155 N.E.2d 116 (1958), which is urged as the basis for the rule, has not been discussed in any subsequent court of appeals decision.[1] The cases in New York have consistently been concerned with occupational limitations upon former employees, and we do not believe that Kristt is of significance in light of Chief Judge Fuld's searching opinions for the court of appeals in Karpinski and Purchasing Associates."

(See also the court's footnote at page 56).

The facts of Bradford, supra, are that the plaintiff was the general manager, vice president and a director of the New York Times at the time of his resignation in 1963. He was in charge of all business operations and reported directly to the publisher. He headed the Times' advertising, circulation, production and promotion departments. He set policy for the advertising department, including the fixing of rates. The court stated he was unquestionably the major figure on the business side of the newspaper. In 1959 the Times adopted an incentive plan which in paragraph 14 provided in substance that no participant of the Plan shall engage in any business or practice in competition with the Times and that in the event of a breach of such agreement the Times, in its sole discretion, may discontinue the installments still unpaid.

On January 1, 1964 Bradford, after previously notifying the Times in October, 1963 of his intention to leave it, became assistant general manager of Scripps-Howard newspaper at a salary of $65,000 a year. His employment with Scripps-Howard terminated on December 31, 1964. It was conceded that Bradford's employment with Scripps-Howard was in direct competition with the Times and clearly violated the agreement. This court is familiar with this case as it was tried before Judge Morris E. Lasker. This court upheld the validity of the forfeiture clause referred to above upon the ground that there was no restrictive covenant in restraint of trade because the agreement did not absolutely prohibit Bradford from working as a competitor, but rather offered him an "attractive option", namely, the retention of substantial retirement benefits. This was the theory adopted by the cases cited in plaintiff's previous memorandum of law, submitted below. The Court of Appeals rejected this approach and stated on page 56 as follows:

> "In any event, we cannot characterize the contract before us as one which afforded Bradford a choice of alternative performances. . . . In our view, this was provision for liquidated damages, which is a normal provision in contracts of this nature and which New York has consistently held to be, not an alternative contract affording the employee an option, but rather one specifically performable at the option of the employer." (Citing authorities)

The court then concluded on page 57 as follows:

> "In sum, we are persuaded that we are presented with a restraint upon a former employee with a provision for liquidated damages in the event of a breach. The reasonableness of the restraint must be tested by the facts in the case before the court. Karpinski v. Ingrasci, supra, 28 N.Y.2d at 49, 320 N.Y.S.2d at 4, 268 N.E.2d at 753. We do not agree that Kristt represents the law of the state if it be construed to eliminate any inquiry into reasonableness because of some purported doctrine of 'employee choice.' The inquiry remains whether or not the restraint was reasonable and the contract was breached."

The restraint the court was referring to was the employee's post employment restrictions in competing with his employer. The trial court has ruled that the restraint here as contained in plaintiff's restrictive covenant was unreasonable and in fact lifted the injunction. In Bradford the court in applying the reasonableness test to the restrictive covenant found it to be reasonable because Bradford was a special, unique and extraordinary employee. They emphasized his duties and functions as described above. They pointed out he was the number two executive of the publication directly responsible for its business operation which involved circulation, advertising, production and promotion. He was also privy to confidential discussions regarding possible mergers and joint printing operations with other New York papers. He reported directly to the publisher.

The trial court found that Goodstein possessed or acquired no such special knowledge, training or skills from the plaintiff and on that basis the injunction was lifted.

In short, Bradford stands for the proposition that a forfeiture based on a restrictive covenant can only be upheld if the restrictive covenant is reasonable. Reasonable in the context of Bradford means whether the employee obtained trade secrets, confidential matter, etc., etc.

The trial court has already ruled that the restrictive covenant in Goodstein is unreasonable, that defendant Goodstein was not privy to any trade secrets, confidential matter, etc., and that the injunction is not supportable. The basis for the injunction and forfeiture are the same and it would be a total inconsistency to find the restrictive covenant unenforceable

and therefore vacate the preliminary injunction but at the same time find the restrictive covenant reasonable to sustain a forfeiture provision.

Interestingly, in the cases cited by the plaintiff in its memorandum of law, which were in any event overruled by Bradford, the competing employee was in direct competition with his former employer. See Kidd v. Oakes, 39 Misc.2d 100, 101. See also Evo v. Jomac, Inc., 119 N.J. Super. 7 (1972).

Clearly, defendant Goodstein has not violated plaintiff's forfeiture provisions and in any event such provisions are patently unenforceable.

POINT II

DEFENDANTS ARE NOT GUILTY OF ANY CONTEMPT BY REASON OF THE FACT THAT NONE OF THE DEFENDANTS VIOLATED THE PRELIMINARY INJUNCTION OF MAY 20, 1974 AND FURTHER BY REASON THAT THE INJUNCTION WAS BASED ON AN UNENFORCEABLE COVENANT NOT TO COMPETE.

This Court granted a preliminary injunction on May 20, 1974 which restrained the defendants Goodstein and "Parksville" from selling mobile homes. Although this order of May 20, 1974 did not so state, by operation of law, defendants were only enjoined from selling mobile homes which were in competition with plaintiff. It hardly needs serious discussion that an injunction being an extraordinary writ can only be granted upon a showing of compelling circumstances, that ordinary monetary damages are not adequate. Manifestly, if plaintiff and defendants did not compete, plaintiff has sustained no damage at all lest alone irreparable damage as required for an injunction and there is no right for either injunctive relief

or damages at law. Undoubtedly the reason why this court did not deem it fit to put in the preliminary injunction of May 20, 1974 the phrase "the sale of mobile homes competitive with plaintiff's inventory" is because plaintiff in its moving papers in support of its application for a temporary injunction unequivocably misrepresented to the court that it sold all types of mobile homes both new and used and of all sizes, models, etc. See Affidavit of Mark A. Salitan, sworn to April 25, 1974, page 5, paragraph 3 (App. 19) wherein he states as follows:

> "3. As an adjunct and important support company to the main business affairs of Rex, a retail sales subsidiary called Loch Sheldrake Mobile was incorporated by us on January 28, 1969, to sell at the retail level <u>new</u> and <u>used</u> mobile homes at a certain location in Fallsburg, New York (sometimes called Loch Sheldrake, New York). This location has always and does now handle, among other mobile homes, any repossessions of inventory of a dealership who may be in default between all the various lending banks with whom Rex has service agreements." (Emphasis supplied)

See also the exhibits attached to the Affidavit of Mark A. Salitan consisting of plaintiff's advertising which clearly indicates that plaintiff sold both new and old mobile homes (App. 23-45, 47). In fact the Court in its subsequent decision of December 31, 1974 was still under the misimpression that plaintiff sold both new and used mobile homes (App. 207-210) where the Court stated, as follows:

> "Defendant also contends that damages should not be assessed because Rex-Noreco's Loch Sheldrake operation 'emphasized' the sale of used mobile homes, while Parksville sold only new ones. This claim is wholly without merit. Rex-Noreco sold new as well as used units and therefore suffered a loss from Parksville's business."

Obviously the nature of plaintiff's inventory was peculiarly within their knowledge and it was only at the trial that it was conclusively established that plaintiff and defendants were totally not competitive. The Court unequivocably stated that the plaintiff and defendants were not competitive (see discussion in POINT I, above). By definition, if the plaintiff and defendants were not competitive the sales by defendants subsequent to the order of May 20, 1974 were not competitive and therefore were not in violation of the court order. If defendants were not in violation of the court order, they were not in contempt of it and the award of $2,070.30 as rendered by the court in its order dated November 7, 1974 is wholly unsupportable. The order of November 7, 1974 was the first order of contempt and awarded the sum of $2,070.30 against defendant "Parksville" only. This sum has been paid. The court at that time stated that it did not have sufficient information to determine the damages sustained by plaintiff as a result of certain sales of defendants in August, 1974 and requested further affidavits on this point, which were submitted in December 1974.

On December 31, 1974, the court having the additional affidavits before it, further assessed defendant "Parksville" with a fine of civil contempt in the sum of $2,455 representing damages sustained by plaintiff. In this decision of December 31, 1974, the court reiterated that plaintiff and defendants were competitive because plaintiff, through its wholly owned subsidiary Loch Sheldrake, sold both new and used mobile homes.

After the trial, when the Court realized that the plaintiff and the defendants were totally non-competitive, on its own motion, vacated its award of $2,455 and vacated all parts of the order of November 7, 1974, except it did not vacate the award of $2,070.30 representing counsel fees and disbursements.

It is respectfully submitted that it is totally inconsistent to hold that the plaintiff and defendants are not competitive and yet at the same time state that the defendants violated the temporary injunction by selling mobile homes admittedly not competitive with plaintiff. It is furthermore respectfully submitted to be wholly inconsistent for the court below, after ascertaining that the plaintiff and defendants were not competitive, to vacate its award of $2,455 for damages previously granted by reason of what was then thought to be improper competitive sales by defendants because of the subsequent discovery of lack of competitiveness but nevertheless find that each of the defendants were in contempt in the sum of $1,000 representing counsel fees. See Court order dated June 10, 1975 omitted from plaintiff's Appendix although recited in the Table of Contents and attached to this brief as an appendix.

This latter fine of $1,000 was assessed against all defendants by reason of a motion for contempt made by plaintiff after trial and decided upon by the court in its decision of May 14, 1975 fining each of the defendants the sum of $1,000 for counsel fees. The basis of this subsequent motion for contempt was for sales made by defendants other than the sales referred to in its prior motion for contempt. Again the principle is the same. If the court finds, as it has, that the plaintiff and defendants

are not competitive and in fact vacated a preliminary injunction previously granted on that ground, then by definition there is no violation of any court order and therefore no contempt. The fact that the court on its own motion vacated its award of $2,455 is conclusive proof that there was no violation of the temporary injunction and if there was no violation of the preliminary injunction there can be no finding of contempt and award of attorneys fees and disbursements.

The order of November 7, 1974 calling for attorneys fees in the sum of $2,070.30 is against the defendant "Parksville" only and such amount has been paid.

The award of $1,000 for attorneys fees based on the order of June 10, 1975 was against all defendants jointly and severally and this amount has not been paid but has been fully secured by a bond in the sum of $4,000 which is in addition to the appeals bond securing the judgment.

Insofar as these orders of contempt affect defendants other than the defendant Goodstein, this brief shall be considered a joint brief by the other defendants and their counsel. The other defendants, namely, "Parksville" and "Filipowski" are only adversely affected by these contempt orders awarding attorneys fees and they are in no way involved in any other of the aspects of this brief, including plaintiff's cross-appeal. The undersigned is fully authorized to submit this brief as a joint brief on behalf of defendants "Parksville" and "Filipowski" with regard to this aspect of the appeal, namely, the award of attorneys fees and disbursements for contempt.

The awards of contempt should not only be set aside by reason of the fact that there was no violation of the court order of May 20, 1974 in view of the fact that such court order manifestly only required the defendants not to sell competing mobile homes, but further such orders should be reversed and vacated by reason of the fact that such awards are excessive and constitute an abuse of discretion as a matter of law.

These two awards for attorneys fees in excess of $3,000, even if the contempt had in fact taken place, represent so called reasonable attorneys fees for the making of two simple motions. It is submitted as a matter of law that an award of $3,000 for two routine motions is grossly excessive. Rather than to go into details in this brief as to the excessiveness and impropriety of the court award of $1,000 for counsel fees for a simple one page motion of contempt which of necessity could not have taken counsel more than an hour or two of his time, reference is made to the letter of March E. Arroll, dated April 28, 1975, contained in the Appendix, pages 474-486. Plaintiff's time records, referred to in the undersigned's letter of April 28, 1975 are found in the Appendix, 456-471.

The decision of the court dated May 14, 1975 awarding attorneys fees in the sum of $1,000 is stated in a total conclusory manner without any attempt to justify or explain how this sum was arrived at. It should be noted that this award of $1,000 was based on a motion for contempt made after the trial and after all briefs had been submitted by both sides and all that was required by plaintiff's counsel in this motion was simply to refer to the temporary injunction of May 20, 1974, the prior order of contempt of November 7, 1974 and the decision of December 31, 1974 and a brief list of those sales made by the defendants as testified

to at the trial, none of which sales were denied, all of which could have been accomplished in a simple two or three page affidavit. In any event, the amount of work in such motion was largely duplicative of the post-trial memorandums of law required to be submitted by both sides on the issue of both injunctive relief and damages. With regard to the prior motion for contempt, wherein $2,070.30 was awarded for counsel fees against the defendant "Parksville", again such award was highly excessive. This award was essentially for the preparation of simple motion papers which simply could not have taken more than a few hours of counsel's time. Again the information set forth in these affidavits was ascertain by plaintiff's counsel in proceedings that took place in any event such as through depositions, investigations and the like and it is simply inconceivable to believe that such a simple motion justifies a counsel fee of $2,000.

Finally, even if it be determined that the Court had the theoretical right to make an award of contempt against the defendants by reason of the fact that the original court order of May 20, 1974 was not limited to the sale of competitive homes, although it is submitted that this is the only interpretation permitted of the court order by operation of law, then it is respectfully submitted that it was a clear abuse of the court's discretion to find the defendants guilty of contempt. Contempt obviously is a wilfull and deliberate violation of a court order. Clearly, the defendants had a right to believe that the court order could not conceivably mean that they were prohibited from selling mobile homes which were totally non-competitive with the plaintiff as was ultimately adjudicated to be the case. If the defendants and their counsel were wrong in their

understanding of the court order, this was clearly a good faith error and not a wilfull one.

POINT III

THE JUDGMENT AWARDING PLAINTIFF DAMAGES AGAINST THE DEFENDANT GOODSTEIN FOR UNAUTHORIZED TELEPHONE CALLS, MOVING EXPENSES AND SEVERANCE PAY SHOULD BE VACATED BY REASON OF THE FACT THAT PLAINTIFF DID NOT GIVE DEFENDANT FAIR NOTICE OF SUCH CLAIM, DID NOT SUE FOR SUCH CLAIM AND WAS IN ALL EVENTS A VOLUNTARY PAYMENT FOR WHICH THEY ARE NOT ENTITLED TO ANY REIMBURSEMENT.

The Court below awarded the plaintiff the sum of $3,816.02 against the defendant Goodstein for unauthorized phone calls in the organization of the corporation "Parksville" ($350), moving expenses in the sum of $2,000 and severance payments in the sum of $1,466.02. This award was made despite the fact that no claim was made for any of these amounts in either plaintiff's complaint or amended complaint. It is fundamental that a plaintiff's law suit must give the defendant fair notice of plaintiff's claim. The Fourteenth Amendment to the United States Constitution requires no less. It provides in relevant part, as follows:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

The cases are legion which hold that the plaintiff must give fair notice to defendant of the nature of plaintiff's claim so that the defendant may have a fair opportunity to defend. If the plaintiff does not mention a claim in any fashion, it is impossible for the defendant to defend a non-existent claim. The Fed. Rules Civ. Proc.have codified the Fourteenth

Amendment in this regard under Rule 8(a) which provides in relevant part, as follows:

> "(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the ground upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that a pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

Neither the complaint nor the amended and supplemental complaint requests relief or reimbursement for any of these items. See App. 3-18, 184-199. Both complaints are identical except that the amended and supplemental complaint brings in the co-defendant "Filipowski". The basis of the complaint against "Filipowski" has nothing to do with any of these items and in fact the judgment of these items is solely against the defendant Goodstein. The five claims in plaintiff's complaint are totally devoid of any reference to a request for these items of relief and in fact very clearly ask for completely different kinds of relief.

Plaintiff's first claim for relief asks for an injunction by reason of defendants' violation of the covenant not to compete.

The second claim is for an accounting of the profits made by defendants during the period of their operation, again based on the covenant not to compete.

The third claim is for unspecified damages in the sum of $275,000. This claim contains two allegations, namely, paragraphs 21 and 22. Paragraph 21 simply repeats paragraphs 1 through 17, which are the allegations dealing with the injunction and paragraph 22 simply makes a request for the sum of $250,000 although in the Wherefore clause there is a

request for $275,000 for this unspecified claim.

The fourth claim is a request for the return of $15,041 which plaintiff alleges Goodstein obtained wrongfully from plaintiff's pension and profit sharing plan.

The fifth claim borders on the incomprehensible, but in any event makes utterly no reference to the items of telephone calls, severance pay and moving expenses or anything remotely resembling same. This claim contains three allegations, the first of which repeats paragraphs 1 through 17, which was the basis for the claim for an injunction. Paragraph 27 then states that the corporate defendant "Parksville" was not completed then (whatever that means) prior to the tortious acts of "Parksville", totally undescribed, and that, therefore, since the corporation was not completed, the principal shareholders, namely Goodstein and "Filipowski" (Filipowski since July 30, 1974) are responsible for the tortious actions, again not mentioned, of "Parksville". And, finally, in paragraph 28, Goodstein and "Parksville" are alleged to be responsible for all damages recovered by reason of the above. Clearly this fifth and final claim has absolutely nothing to do with Goodstein's phone calls, moving expenses or severance payments. The apparent thrust of this claim is that the corporation "Parksville" did something or other improper and because it was deficiently formed in some unnamed respect that the principal shareholders and officers are responsible. Interestingly, despite the fact that the fifth claim does not mention any damages, the Wherefore clause does, namely, $275,000 against Goodstein and $262,500 against "Filipowski".

Defendant Goodstein simply defies any honest person to find anywhere in this complaint where there is any language even reasonably susceptible of a claim for unauthorized phone calls, severance payments or moving expenses.

Furthermore, it should not be necessary to try to find some vague language to twist and contort into such a claim. Plaintiff had no difficulty in framing a rather specific complaint for the return of pension monies. Why couldn't the plaintiff, with the same degree of specificity have drawn up a complaint where a claim was made for unauthorized phone calls, moving expenses and severance payments and name them in just that way and give their amounts. However, plaintiff at the time it drew up its complaint never had these items in mind and subsequently made a claim for them as an after thought, or if plaintiff did have them in mind to begin with, then plaintiff deliberately went out of its way not to reveal them in the complaint or for that matter in any other pretrial paper. In either event, the result is impermissible.

The court apparently recognized the difficulties of making an award for unpleaded claims when it stated in its opinion of May 14, 1975 on pages 2 and 3, App. 489-490, as follows:

> ". . . The cost of the telephone calls which were charged to Rex is fixed and readily ascertainable. The amounts paid to Goodstein for severance pay and moving expenses are also fixed; and Rex is entitled to these items because it surely would not have made these voluntary payments had it known of Goodstein's disloyalty."

The Court is tacidly admitting its difficulty in justifying its result. When the Court uses the expression that the plaintiff "surely would not have made these voluntary payments" the Court is admitting not only that there was no claim for this, but that there wasn't even any

testimony on this point, as in fact there was none. If there were testimony on this point that these payments were not only made but that they would not have been made if plaintiff had sooner known about Goodstein's setting up another corporation, certainly the Court would have at least made a general reference to the testimony at the trial. No such reference was made because no such testimony or proof was offered and in fact no such claim was even alleged. In any event, the so-called disloyalty of Goodstein referred to by the Court but not described therein could only refer to the fact that he formed the defendant "Parksville" signed the lease, etc. while in the employ of plaintiff. Since the Court has already found that "Parksville" did not even begin to operate until 10 weeks after Goodstein left his employ with plaintiff and that even when "Parksville" did begin to operate it was in no way competitive with plaintiff, there can be no possible basis for claiming that Goodstein was "disloyal".

The Court also found, as has been previously mentioned, that there is no proof that at any time Goodstein's work was less than satisfactory and in fact there is no such claim of this in plaintiff's complaint and, of course, no proof was offered.

Even if these acts of Goodstein in forming "Parksville" could be construed an act of disloyalty, it cannot be seriously suggested that the few hours of time which Goodstein might have expended in arranging for his attorneys to form a corporation, to obtain insurance and so forth caused damage to the plaintiff in an amount close to $4,000. In fact, the Court's only basis for this claim is that these payments for severance pay and moving

expenses would not have been made if they had known that Goodstein had formed "Parksville", etc. There is no suggestion by the Court, nor is there any suggestion made by plaintiff, that Goodstein's acts somehow damaged plaintiff in loss of customers, profits and the like. As the Court pointed out, these payments were voluntary. This Court need not be remined that a party who makes a voluntary payment which is really nothing more than a completed gift cannot get such payment back in absence of a fraud or other similar compelling circumstances.

Presumably severance pay of $1,466.02 was based on past service rendered by Goodstein to plaintiff for a period of approximately 10 years. Plaintiff undoubtedly based this payment on Goodstein's outstanding employment record with plaintiff as well as the custom and tradition of the plaintiff with other employees of a comparable nature. To suggest that Goodstein may now be required to return this voluntary payment is really in the nature of an unenforceable forfeiture.

With regard to the sum of $2,000 for moving expenses, this sum was not only voluntarily paid by the plaintiff to defendant, but was necessitated because the plaintiff approximately two years before Goodstein's employment with it terminated, was required to operate a sales location of plaintiff's in North Carolina. Goodstein was therefore required to move from the State of New York to North Carolina. A few months before Goodstein's termination of employment, he had returned to New York from North Carolina, although many of his personal effects were still there.

To suggest that plaintiff can require an employee to move himself, his wife and family, consisting of six children and his mother, approximately 1,000 miles and then leave him stranded in such jurisdiction by refusing to pay his moving expenses home because the employee decides to go into a non-competitive business with the employer is unconscionable and shocking. This is especially so when the employer did not even make a claim for this item in its complaint.

The claim of $350 for phone calls is again not requested in any form in the complaint.

As these phone calls were for the purpose of forming a non-competitive corporation and as the plaintiff acknowledged at the trial that personal phone calls were within broad limits permitted, this claim must be dismissed. In the event the question is raised in the Court's mind as to how the defendants permitted the plaintiff to offer any proof of these damages at the trial, it is submitted that essentially no such proof was offered. Defendant Goodstein admits receiving these sums of money and making these phone calls. At the trial when proof of phone calls was offered as well as with respect to the other items, it was defendant counsel's clear understanding that such items were being offered solely for the purpose of demonstrating that the defendant Goodstein had committed acts which would be a ground for discharge for cause so as to entitle the plaintiff to a forfeiture of the pension and profit sharing monies. As no claim for these monies was made in the complaint, this was not only a reasonable understanding of the offer of proof, but frankly the only fair understanding of the offer.

That these items of alleged damage were offered by plaintiff solely to demonstrate the applicability of the "forfeiture clause" rather than as a separate claim in and of themselves, was recognized by the court below in its various opinions. (App. 416, par. 7; 417, par. 3; 489-490.)

Bluntly if defend. t's counsel were mistaken in their understanding, this was not their fault but rather the fault of the draftsmanship of plaintiff's pleadings.

The Court's have always recognized that the function of pleadings under the Federal Rules is to give fair notice of the claim asserted so as to enable the adverse party to answer and prepare for trial, to allow for the application of a doctrine of res adjudicata and to show the type of case brought, so that it may be assigned to the proper for of trial. Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99 (1957). The federal courts have not hesitated to dismiss complaints as violating Rule 8(a) of the Fed. Rules of Civ. Proc. when the complaint stated the claim in rather conclusory language. See American Broadcasting Co. v. Wahl Co., 36 F.Supp. 167 (S.D.N.Y. 1940) where a complaint alleging ownership of a copyright of a radio quiz program, that plaintiff broadcast the program and that defendant infringed on the copyright by broadcasting another program, was held insufficient as being "mere conclusions". In that case at least the defendant had some idea of what plaintiff's complaint was about and it was nevertheless dismissed. Here the plaintiff's complaint does not even come close to giving the same notice given by plaintiff in American Broadcasting Co. v. Wahl Co., supra. There is little doubt the courts try to be liberal on the matter of pleadings because the Fed. Rules of Civ. Proc. give various pre-trial devices for discovery of facts and formulation of issues. It should be noted that defendant Goodstein attempted to elicit from plaintiff, prior to trial,

the precise nature of plaintiff's claims. The undersigned attorneys for defendants were only retained in December, 1974, having replaced defendant's prior attorneys. On January 2, 1975 defendant Goodstein, pursuant to Fed. Rules of Civ. Proc. 33 requested answers to written interrogatories. Plaintiff never responded to such demand. The only conceivable claim that could cover these items is claim number three of the complaint which generally asks for either $250,000 or $275,000 depending on what part of the complaint you read. This claim is totally unspecified. In item 19 in defendant's demand for interrogatories, plaintiff was specifically asked how the sum of $250,000 as referred to in paragraph 22 of the amended and supplemental complaint is calculated. No response was ever made nor did the Court ever direct plaintiff to make such a response despite a letter dated January 2, 1975 of defendant's counsel to the Court requesting same. In any event, responses to interrogatories cannot cure totally deficient pleadings.

If defendant Goodstein were aware that plaintiff was making a claim for these items, he would have an opportunity to have an opportunity to defend adequately this claim. For one thing, defendant Goodstein would have been able to show, if he would have been apprised of these claims, that the sum of $2,000 for moving expenses was in part at least for other items and services to which Goodstein was entitled despite the legend on any check to the contrary.

Complaints are supposed to do more than merely let the court and the clerk know what type of case is being brought and into what category it belongs. In this case plaintiff did not even do that.

This is not the case of a complaint that was drawn in an inarticulate fashion by an individual having limited knowledge of the English language. Rather this was a complaint drawn by a competent law firm which deliberately or otherwise omitted claims for relief which easily could have been pleaded in a matter of a few sentences but which were apparently deliberately omitted.

If, as the Court suggests, plaintiff would not have made these voluntary payments to Goodstein if it had known Goodstein's "disloyalty", what theory is being suggested by the Court?
What the Court is really saying is that the plaintiff either made a mistake or Goodstein perpetrated a fraud. In either event plaintiff's complaint is therefore further deficient in failing to comply with Fed. Rules of Civ. Proc., Rule 9(b):

> "(b). Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

A claim based on fraud or mistake must be stated with particularity. Here it was not even stated generally. In the case of fraud or non-disclosure, there must be an allegation that the defendant has made a representation or a non-disclosure in regard to a material fact and what that non-disclosure or misrepresentation was. Second, that such misrepresentation or non-disclosure is false and is made intentionally. And, finally, that the plaintiff

justifiably relied upon such misrepresentation or non-disclosure to his or her detriment and was induced to act by reason of such misrepresentation or non-disclosure. The plaintiff is also obliged in the normal course of events to state the time, place and content of such misrepresentations. Southern Dev. Co. v. Silva, 125 U.S. 247, 8 S. Ct. 881 (1888).

The required allegations for mistake are almost identical. As the federal court under amended Rule 12(e) no longer permits a bill of particulars and as applications for more definite statements are not a favored motion, and are rarely granted, there is even greater need for particularity in such types of law suits, such as for fraud and mistake. The plaintiff having given absolutely no notice of such claim precluded the defendants from raising any questions or making any motions because defendants simply had no reason to believe that such a claim was even being contemplated. It is hard to imagine a more flagrant violation of both Fed. Rules of Civ. Proc. 8(a) and 9(b). With all due respect, if plaintiff is permitted to recover on these items, then these rules have utterly no meaning.

CONCLUSION

Plaintiff's cross-appeal should be dismissed, the orders of contempt of November 7, 1974 and June 10, 1975 awarding counsel fees should be vacated and the sum of $2,070.30 paid on account of the Court order of November 7, 1974, be remitted to the defendant "Parksville", and that

portion of the judgment of June 10, 1975 awarding $3,816.02 to the plaintiff against defendant Goodstein reversed and vacated.

Respectfully submitted,

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MARK E. ARROLL,

Of Counsel

[illegible] DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REX-NORECO, INC.,

Plaintiff,

-against-

ISIDORE GOODSTEIN, PARKSKILL MOBILE MODULAR HOMES, INC., and ADAM FILIPOUSKI,

Defendants.

COUNTER-PROPOSED ORDER OF CIVIL CONTEMPT OF COURT

74 Civ. 1728 CMFL

#75,523

REX-NORECO INC., the plaintiff herein, having moved for an order holding the defendants and each of them in contempt of the PRELIMINARY INJUNCTION entered by this Court on May 20, 1974 (which ORDER was AFFIRMED by the Court of Appeals on July 3, 1974) and the COURT HAVING heard the findings and the argument of counsel with respect to said motion and having read the written briefs of the PARTIES relating thereto, and the Court having on April 14, 1975 rendered its Memorandum Opinion with respect to said motion, and it appearing to the Court, as set forth in said Opinion, that the defendants and each of them have acted in violation of the PRELIMINARY INJUNCTION hereinabove referred to;

IT IS accordingly ORDERED, ADJUDGED AND DECREED that each of defendants ISIDORE GOODSTEIN, PARKSKILL MOBILE MODULAR HOMES, INC and ADAM FILIPOUSKI have committed a CIVIL contempt of this

Court for their failure and refusal to comply with the said May 30, 1974 preliminary injunction; and said defendants are held in civil contempt as follows:

(a) GOODSTEIN and PARKSVILLE are held in contempt for all sales (apart from those on which we ruled on the original motion) which were contracted for by PARKSVILLE after the effective date of the preliminary injunction;

(b) FILIPOWSKI is held in contempt for all sales made by PARKSVILLE after July 30, 1974; and it is further

ORDERED, ADJUDGED AND DECREED, that plaintiff has sustained no damages and is not entitled to any compensatory damages but is entitled to the sum of $1,000.00 representing attorney's fees and costs for counsels' services in conjunction with plaintiff's motion for contempt, dated February 27, 1975, and defendants, or any of them, are hereby ordered to pay to plaintiff the sum of $1,000.00 representing attorney's fees and costs, and it is further

ORDERED, ADJUDGED AND DECREED, that the Order of this Court dated November 7, 1974, ~~and the Memorandum Decision of this Court dated December 31, 1974~~, are vacated to the extent ~~upon the ground~~ that plaintiff [redacted] is not entitled to compensatory damages, and defendant, PARKSVILLE, is relieved from any liability for compensatory damages, ~~as specified in the aforementioned Order and Memorandum Decision~~.

Dated: June 10, 1975

Thomas C. Platt
U. S. D. J.

JUDGMENT ENTERED - 6/12/75
Raymond F. Burghardt
CLERK

net

ENDORSEMENT

REX-NORECO, INC., Plaintiff, v. ISIDORE GOODSTEIN, PARKSVILLE MOBILE MODULAR HOMES, INC., and ADAM FILIPOWSKI., Defendants.
74 Civ. 1728

LASKER, D.J.

The motion to proceed on appeal in Forma Pauperis without prepayment of fees or costs is granted. Pursuant to 28 U.S.C. §1915(d), the court requests Mark E. Arroll to act as attorney for the Defendant Isidore Goodstein on appeal.

The application that the defendant Isidore Goodstein be provided with a free stenographic transcript of the trial record is denied. Assuming the authority of the court to make such an order, the circumstances of the case do not justify imposing the expense in question upon the United States or any other person, entity or party.

It is ordered.

Dated: New York, New York
September 3, 1975

MORRIS E. LASKER
U.S.D.J.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK

COUNTY OF NEW YORK

Edwina McKinnon being sworn, says:

I am not a party to this action, I am over 18 years of age; I reside at 90-36 77th Street, Woodhaven, New York.

On January 23 , 1976, I served the within Brief of Defendant Goodstein-Appellant-Appellee and Joint Brief of all Defendants-Appellants-Appellees with Respect to POINT II upon Finley, Kumble, Heine, Underberg & Grutman, Attorneys for Plaintiff-Appellee-Appellant, 477 Madison Avenue, New York, New York and John F. Martin, Attorney for Defendants Parksville Mobile Modular Homes, Inc. and Adam Filipowski-Appellants-Appellees, 342 Madison Avenue, New York, New York, by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depositary under the exclusive care and custody of the United States Postal Service within the State of New York.

Edwina McKinnon

Sworn to before me this
23rd day of January, 1976.

MARY ARGOLL
Notary Public, State of New York
No. 30-5110650
Qualified in Nassau County
Commission Expires March 30, 1976